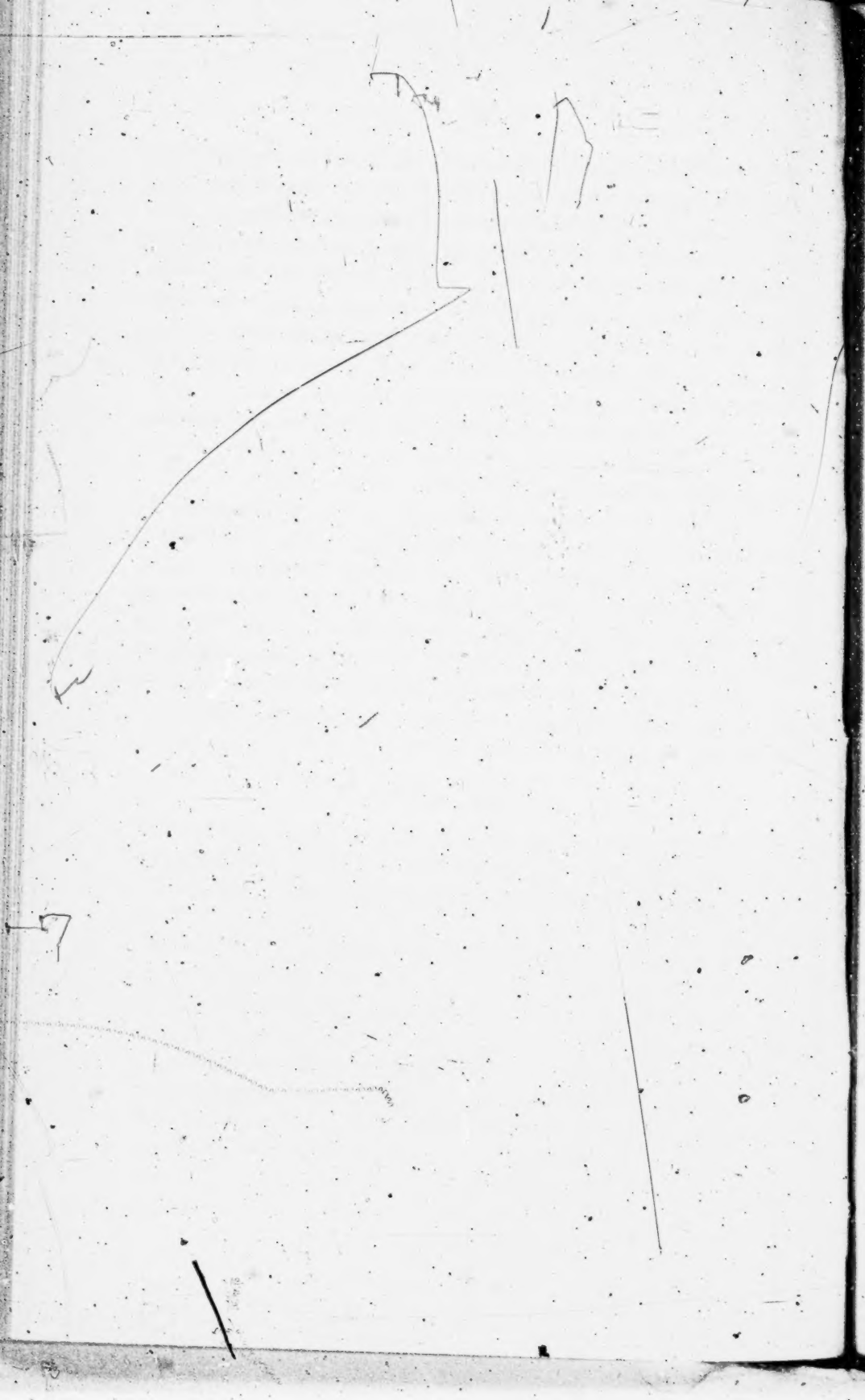

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 329

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ET AL., *Appellants,*

vs.

PHIL GALLAGHER, AS STATE TREASURER OF THE STATE OF WASHINGTON, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

APPELLEES' ANSWER TO STATEMENT AS TO JURISDICTION.

B. GRAY WARNER,
EDWIN C. EWING,
HARRY H. JOHNSTON,
RALPH E. FOLEY,
A. W. SWANSON,
H. W. COVALT,
SMITH TROY,
PAUL O. MANLEY,
JOHN D. EVANS,
GLENN L. BEAN,
SAM M. DRIVER,
ALFRED J. SCHWEPPE,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 329

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS; CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT AND JANE SOUSA,

Appellants,

vs.

PHIL GALLAGHER, AS STATE TREASURER OF WASHINGTON; CLIFF YELLE, AS STATE AUDITOR OF WASHINGTON; ERNEST N. HUTCHINSON, AS SECRETARY OF THE STATE OF WASHINGTON; G. W. HAMILTON, AS ATTORNEY GENERAL FOR THE STATE OF WASHINGTON; B. GRAY WARNER, AS DISTRICT ATTORNEY OF KING COUNTY OF WASHINGTON; HARRY H. JOHNSTON, AS DISTRICT ATTORNEY OF PIERCE COUNTY OF WASHINGTON; RALPH E. FOLEY, AS DISTRICT ATTORNEY OF SPOKANE COUNTY OF WASHINGTON; A. W. SWANSON, AS DISTRICT ATTORNEY OF SNOHOMISH COUNTY OF WASHINGTON; H. W. COVALT, AS DISTRICT ATTORNEY OF WHATCOM COUNTY OF WASHINGTON; SMITH TROY, AS DISTRICT ATTORNEY OF THURSTON COUNTY OF WASHINGTON; PAUL O. MANLEY, AS DISTRICT ATTORNEY OF GRAYS HARBOR COUNTY OF WASHINGTON; JOHN D. EVANS, AS DISTRICT ATTORNEY OF YAKIMA COUNTY OF WASHINGTON; GLENN L. BEAN, AS DISTRICT ATTORNEY OF WALLA WALLA COUNTY OF WASHINGTON; SAM M. DRIVER, AS DISTRICT ATTORNEY OF CHELAN COUNTY OF WASHINGTON; K. M. O. INC., A CORPORATION; JOHN G. LOCKHART,

Appellees.

APPELLEES' ANSWER TO APPELLANTS' STATEMENT AS TO JURISDICTION.

A Direct Appeal to This Court Does Not Lie from the Judgment of the District Court Dismissing Appellants' Bill of Complaint on the Ground of Lack of Jurisdiction.

The appellants have applied directly to this Court from the decree of dismissal entered on June 28, 1938, in reliance upon the provisions of Section 266 of the Judicial Code, granting a direct appeal to the Supreme Court from an order of a three-judge statutory court granting or denying, after a hearing on the application therefor, an interlocutory order suspending or restraining the enforcement, operation or execution of any statute of a State.

The provisions of Section 266 permitting a direct appeal do not apply to this case. The findings of fact, conclusions of law and decree entered by the three-judge court dismissed the bill of complaint solely on the jurisdictional ground that the appellants have failed to show that the requisite amount was in controversy. The hearings held by the three judges were devoted to arguments on the preliminary question of jurisdiction raised by the appellees' motion to dismiss the bill of complaint. The bill of complaint having been dismissed for lack of jurisdiction, the determination of which was necessarily preliminary to any action of the court upon appellants' application, the three judges never functioned as a statutory three-judge court. The fact that the decree incidentally recites that the interlocutory injunction is denied cannot affect the fact that the sole determination of the case made by the court was upon a jurisdictional ground.

A three-judge court has a purely statutory existence. Its jurisdiction can be invoked only for the specific purpose of passing upon an application for an interlocutory injunction restraining the enforcement of a State statute. The pur-

pose of Section 266 in permitting a direct appeal from the decision of a three-judge court, after a hearing on the application for an interlocutory injunction, is to permit a speedy determination by the court of last resort in the important class of cases involving the validity and enforcement of a State statute.

Stratton v. *St. Louis S. W. Ry.*, 282 U. S. 10, 14.

This Court has held that the provisions of Section 266, requiring the presence of a three-judge court, necessarily assume that the District Court has jurisdiction. The preliminary question as to jurisdiction of a three-judge court need not be determined by the three judges, but may be determined by a single district judge.

Ex parte Poresky, 290 U. S. 30, 31, 32.

Where, as in the instant case, either a district judge or the three judges determine, in advance of any determination of the merits of complainant's application for an interlocutory injunction, that the court lacks jurisdiction, and dismiss the bill of complaint for that reason, the three-judge court, even though called, has never functioned for the purpose provided in Section 266, and hence the provisions for a direct appeal have no application.

This Court has repeatedly held that when it has been determined, either by a district judge, sitting alone, or by three judges, that the complainant has failed to show grounds sufficient to invoke the jurisdiction of a three-judge court under Section 266, then, even though the three-judge court may have been properly convened, its action is no longer prescribed, and no direct appeal to the Supreme Court lies from the decision denying, for lack of jurisdiction, a hearing before the three-judge court.

Oklahoma Gas & Electric Co. v. *Oklahoma Packing Co.*, 292 U. S. 386;

California Water Service Co. v. *City of Redding*, 58 Sup. Ct. Rep. 865;
Ex parte Buder, 271 U. S. 461;
Gully v. *Interstate Natural Gas Co.*, 292 U. S. 16;
Ex parte Poresky, 290 U. S. 30.

Here, there has been a determination that the appellants' bill of complaint fails to establish jurisdiction in either the three-judge or any other Federal court to hear the application for an interlocutory injunction. Under the rule determined by this Court in the cases cited above, the Court's decision being on a jurisdictional ground, appellants may not take an appeal direct to this Court.

The major part of appellants' statement as to jurisdiction is not addressed to the question of the jurisdiction of this Court, but is devoted to the merits of the appeal. We reserve our answer to these arguments until the appropriate time after this Court has determined whether or not it has jurisdiction of the appeal.

Respectfully submitted,

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